TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917.

No. [redacted] 365

THEODORE S. BOWES AND ABRAHAM WAGNER, PETITIONERS,

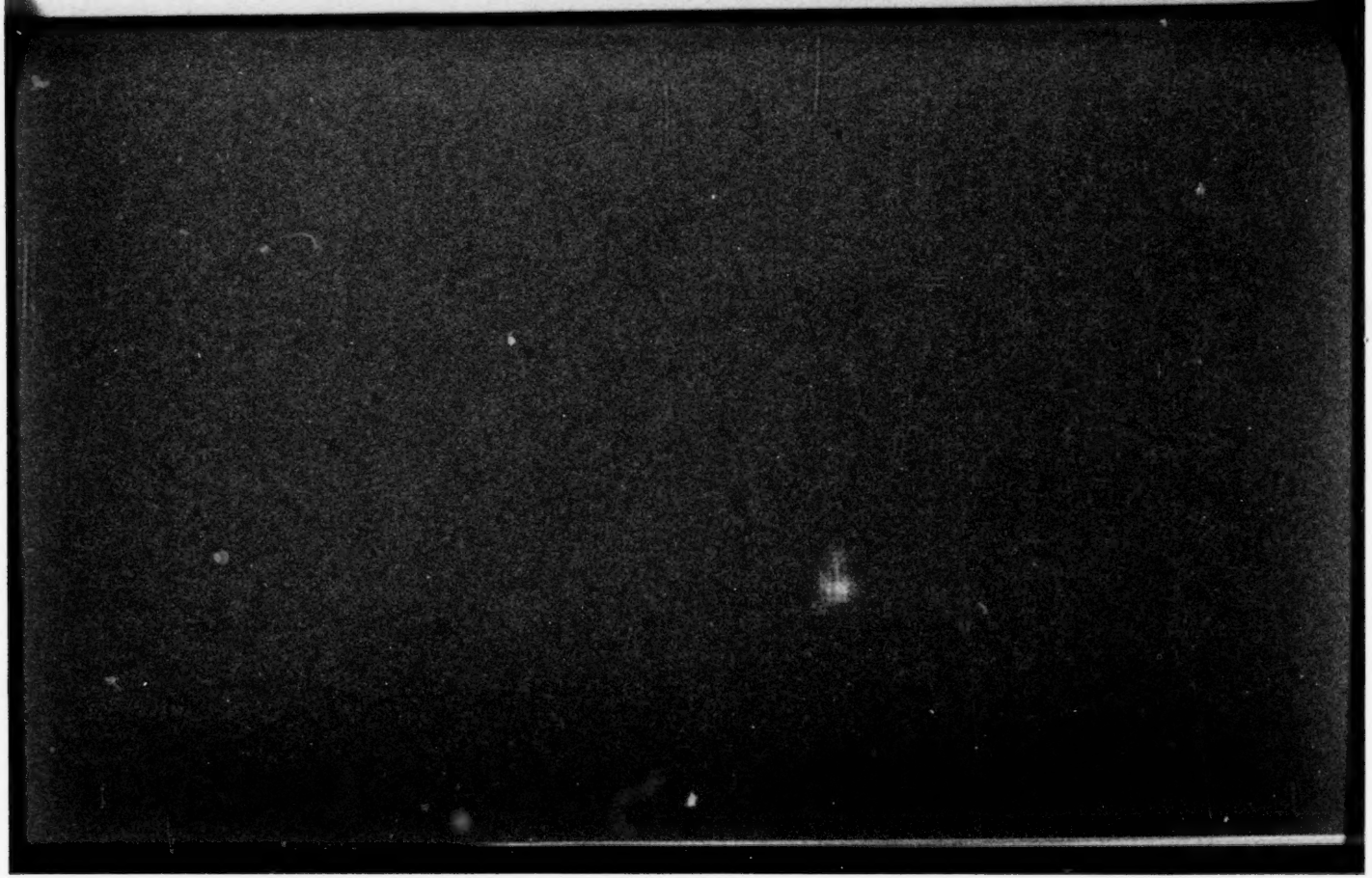
vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

[redacted]

[redacted]



(25,698)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 868.

THEODORE S. ROSEN AND ABRAHAM WAGNER, PETITIONERS,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 18, 1917.

Original.

United States Circuit Court of Appeals, for the Second District.

THEODORE S. ROSEN AND ABRAHAM WAGNER, Plaintiffs-in-Error (Defendants below),

vs.

UNITED STATES OF AMERICA, Defendant-in-Error (Plaintiff below).

RECORD ON APPEAL.

Meier Steinbrink, Attorney for Plaintiff-in-Error, Theodore S. Rosen, 215 Montague Street Borough of Brooklyn, City of New York.

Bick & Freedman, Attorneys for Plaintiff-in-Error, Abraham Wagner, 215 Montague Street, Borough of Brooklyn, City of New York.

Melville J. France, United States District Attorney, Attorney for Defendant-in-Error, United States Post Office Building, Borough of Brooklyn, City of New York.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Eastern District of New York, Greetings:

Because in the record and proceedings, as also in the verdict of the jury and the judgment entered thereon before you or some of you between Abraham Wagner and Theodore S. Rosen, the plaintiffs-in-error, and the United States, the defendant-in-error, a manifest error hath happened, to the great damage of the said Abraham Wagner and Theodore S. Rosen, as is said and appears by the complaint: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the court room of said court in the Post Office Building in the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 15th day of March, 1916; that the records and proceedings aforesaid being inspected, the said Judges of the Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States ought to be done.

2 Witness, Honorable Thomas I. Chatfield and Honorable Van Vechten Veeder, United States District Judges, this 15th day of February, in the year of our Lord, one thousand nine hundred and sixteen.

[SEAL.]

PERCY G. B. GILKES,
Clerk of the District Court of the Eastern District of New York.

The foregoing writ is hereby allowed.

THOMAS I. CHATFIELD,
U. S. D. J.

Indictment.

District Court of the United States of America, for the Eastern District of New York.

At the Stated Term of the District Court of the United States of America, for the Eastern District of New York, begun and held in the Borough of Brooklyn, City of New York, within and for the District aforesaid, on the sixth day of October, in the year of our Lord one thousand nine hundred and fifteen, and continued by adjournment to and including the ninth day of November, in the year of our Lord one thousand nine hundred and fifteen.

EASTERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, within and for the district aforesaid, on their oaths present that Theodore
3 S. Rosen, Abraham Wagner and Samuel Broder, each of them late of the Borough of Brooklyn, County of Kings, State and Eastern District of New York, heretofore, to wit: on various days and times between the first day of September, nineteen hundred and fifteen, and the tenth day of September, nineteen hundred and fifteen, at the Borough of Brooklyn, County of Kings, State and Eastern District of New York, and within the jurisdiction of this Court, knowingly, willfully and unlawfully did conspire, combine, confederate and agree together to commit an offense against the United States, that is to say, did knowingly, willfully and unlawfully conspire, combine, confederate and agree together to buy, receive, and aid in buying and receiving, certain checks and letters which said checks and letters had theretofore been placed in the mails of the United States for mailing and delivery and which said checks and letters had theretofore been stolen, taken and abstracted from and out of duly authorized depositories for mail matter of the United States, and which said checks and letters were known to the said Theodore S. Rosen, Abraham Wagner and Samuel Broder to have been so stolen, taken and abstracted as aforesaid;

And the Grand Jurors aforesaid, on their oath aforesaid, do further present, that in furtherance of the said unlawful conspiracy, combination, confederation and agreement, and in order to effect the

object of the same, the said Theodore S. Rosen, Abraham Wagner and Samuel Broder, and each of them, did, on or about the sixth day of September, nineteen hundred and fifteen, at the Borough of Brooklyn, County of Kings, state and Eastern District of New York, and within the jurisdiction of this Court, knowingly, willfully and unlawfully buy and receive, and aid in buying and receiving, a certain check, which said check had theretofore been placed
4 in an envelope for mailing and delivery, and which said check and envelope had theretofore been stolen, taken and abstracted from a duly authorized depository for mail matter of the United States, which said check was in the words and figures as follows:

"No. 3602.

HARTFORD, CONN., Sept. 4, 1915.

The Fidelity Trust Company.

Pay to the Order of Joseph D. Zerwich Nineteen 08/100 Dollars $19.08.

MAX SHULMAN."

(On left hand margin:) Max Shulman, General Merchandise, 820-826 Park St."
(On the back thereof:) "Joseph D. Zerwich, A. Wagner."

and which said check was known to the said Theodore S. Rosen, Abraham Wagner and Samuel Broder to have been so stolen, taken and abstracted as aforesaid, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States in such case made and provided.

MELVILLE J. FRANCE,
United States Attorney for the Eastern District of New York.

5 Endorsed: Crim. 1-382. 1670. United States District Court, Eastern District of New York. The United States of America vs. Theodore S. Rosen, Abraham Wagner and Samuel Broder. Indictment. Section 37 and 194 C. C.. Melville J. France, United States Attorney, Federal Building, Borough of Brooklyn, New York City, N. Y. A true bill. C. G. Ingersoll, Foreman. Filed Nov. 9th, 1915.

November 10, 1915.—Defendants Rosen and Wagner arraigned. Each pleads not guilty. Bail fixed at $5,000 as to each for January term, 1916. Said defendants remanded. Bail given by Rosen. Recognizance filed.

November 11, 1915.—Defendant Wagner present on motion of Mr. Bick. Bail reduced to $3,500.00. Bail given. Recognizance filed by Wagner.

November 12, 1915.—Notice of motion and affidavit filed on behalf of Wagner for bill of particulars.

6 November 16, 1915.—Defendant Broder arraigned. Plea guilty. Remanded for sentence.

November 17, 1915.—Motion for bill of particulars on behalf of Wagner argued and submitted.

November 18, 1915.—Decision rendered. Motion for bill of particulars denied (endorsed on papers).

January 5, 1916.—Case called. Defendants Rosen and Wagner present. Indictment severed as to Broder and defendants Rosen and Wagner ordered to return Jan. 25, 1916, at 10.30.

January 25, 1916.—Case called. Defendants Rosen and Wagner present. Case adjourned to and Defendants Rosen and Wagner ordered to return Jan. 26, 1916.

January 26, 1916.—Case called. Defendants Rosen and Wagner present. Jury drawn and sworn. Trial suspended to and defendants Rosen and Wagner ordered to return Jan. 27, '16, at 10 A. M.

January 27, 1916.—Trial resumed and suspended to Jan. 28, 1916, at 10 A. M. Defendants Rosen and Wagner present. Ordered to return Jan. 28 at 10 A. M.

January 28, 1916.—Trial resumed and suspended until Jan. 29, 1916, at 10 A. M. Defendants Rosen and Wagner present ordered to return Jan. 29, 1916, at 10 A. M.

7 January 29, 1916.—Trial resumed and concluded. Verdict guilty with recommendation of mercy as to both Rosen and Wagner. Defendants Rosen and Wagner remanded until Feb. 2, 1916, and January term, 1916, extended to Feb. 10, 1916. Order entered for sustenance for jurors.

February 2, 1916.—Sentence of Rosen and Wagner postponed until Feb. 8, 1916.

February 8, 1916.—Case called. Defendants Rosen and Wagner called. Present, Asst. U. S. Attorney Beer moves sentence. Defendant Theodore S. Rosen sentenced to be imprisoned for eighteen months (18) and defendant Abraham Wagner for one (1) year and one (1) day. Both sentences to be executed in U. S. Penitentiary at Atlanta, Ga. January, 1916, term extended to March 1, 1916. Writs of commitment issued (2).

February 15, 1916.—Petition and assignment of error filed. Order entered allowing writ of error, etc. Writ of error issued. Writ of error and citation filed. Joint bail in $5,000.00 to be given.

February 16, 1916.—Defendants Rosen and Wagner present. Court ordered that upon said defendants executing and filing a proper bail bond, their sentence will be stayed and said defendants ordered to return April 5, 1916. Joint bail bond filed returnable April 5, 1916.

March 8, 1916.—Bill of exceptions filed.

8 *Bill of Exceptions.*

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA

against

THEODORE S. ROSEN and ABRAHAM WAGNER.

JANUARY 27, 1916.

The defendant Broder having pleaded guilty previously and remanded for sentence, the indictment as to Rosen and Wagner was severed and continued as to them. The case of Rosen and Wagner was called for trial on January 27, 1916, before the Court with a jury, which had been duly examined, accepted and sworn. The District Attorney, both defendants and the attorney for each were present. Mr. Beer Assistant United States Attorney, addressed the jury and called as a witness Samuel Broder, who was in Court.

SAMUEL BRODER, called as a witness on behalf of the Government:

Mr. Steinbrink: Before the witness is sworn we wish to object on the ground of the witness's incompetency, and we produce here the certified copy of his conviction for a felony.

The Court: I think it is well understood that under the law
9 which governs Federal courts, conviction for a felony carries with it the loss of the right to testify unless in some matter that directly concerns a charge against the defendant himself, but that rule of law has been universally modified since by statutes in the various states limiting the effect of sentences, where disqualifications of citizenship are effected by the State statutes. In the State of New York, conviction with a suspended sentence, or conviction followed by a sentence to Elmira Reformatory, does not carry with it the loss of citizenship, so that for two reasons—one, that the defendant is a co-defendant, and therefore, may make a statement as to the matters with which he is concerned, and also for the reason that this paper, which you may mark Exhibit A on behalf of the defendants, shows that his sentence was to the Elmira Reformatory, I will hold the man has not lost the right to testify as a witness in the case

Mr. Steinbrink: Will your Honor bear in mind the fact that the indictment here has been ordered severed, so he does not stand in this case as a co-defendant.

The Court: I am not placing it (as apart from the other rule) upon the ground that he is a co-defendant on trial. I do not think that reason of itself would be sufficient because the man is not on trial, and has no more to do with this particular trial than if he happened to be under arrest for an altogether different crime.

Mr. Steinbrink: I make that statement to your Honor because you said he had the right to make a statement. Will your Honor permit me (not to dissuade your Honor's conclusion if you have already

concluded) to ask your Honor to look at the case of United States against Maxey, 207 Federal Reporter.

The Court: Decided in what State?

10 Mr. Steinbrink: I don't know which jurisdiction it was in, but I presented this same question to United States Judge Bradford in Delaware, and on the basis of the Maxey case he upheld the contention.

The Court: What page?

Mr. Steinbrink: Page 331 is the salient part of it. That also was an indictment for conspiracy. Beginning "We are not unmindful that the trend of modern opinion."

The Court: My attention has been called to the case of Maxey against the United States, which is the authority referred to, 207 Federal, 327, in which, upon the authority of Logan against U. S. 144 U. S. 263, it is said that the common law as it was known in this country when the Judiciary Act of 1789 was enacted, controls the admissibility of testimony in criminal cases. And at the time the Logan case was decided it was said that it had been an established practice for sixty years. It is evident now that the practice has been established for over 125 years, and under the Logan case competency is—except so far as Congress has made specific provisions upon the subject—governed by the common law. The provisions of common law of the State of New York is the same as the common law of the United States. Where a sentence has been suspended no conviction has been completed, and the procedure in Court prior to sentence is no conviction within the meaning of the statutes which disqualify the person who has been "convicted" from the rights of citizenship.

In the case of Maxey against the United States, supra, the head-note says that the law of the United States Courts in criminal cases is the common law of the State where the trial is had, as it was when "such courts" were established. I think the head-note seems to be misleading, because the decision was as to the common law at

11 the time the courts of the United States were established. The decision goes on to say that the common law of Texas, which was in question, was the same as the general common law in 1789, and then states what that was. The head-note that the common law of the State (at a time years before the State was formed) would be the test, is an inaccurate statement.

It has been always held within the boundaries of the State of New York that sentence, or the disposition of a case, which was equivalent to a suspension of sentence, or so as to save disqualification by a sentence under the statute, was not a sentence for a felony. The Elmira Reformatory was created, and is authorized, to take prisoners in the case of boys under twenty-one, who shall not thereby be made felons, and so, when a Federal court sends a man in New York State to the Elmira Reformatory, it is merely doing a thing which under the common law would be equivalent to suspending sentence so far as citizenship is concerned. While I do not know whether the question has been passed upon or disposed of before, I think that is the better rule, and according to law. I overrule the objection.

Mr. Steinbrink: May I add the test of common law was not what

was the punishment meted to the defendant. The test was the crime of which he was convicted, an infamous crime; was it a felony?

The Court: I have said the conviction is not a complete conviction so as to carry the loss of citizenship until the Court acts upon that conviction, or there is some record of sentence making the defendant a felon. It has never been held that where a sentence has been entirely suspended (where, therefore, the Court has taken no action) whether the verdict should control and the man should lose
12 citizenship. I am not going to start that unless authority says so.

Mr. Steinbrink: I agree with your Honor, but here is a certificate which shows a conviction for a felony and sentence in Elmira, which has not been held to be a suspension for this reason. It happens when he was convicted he was under twenty-one. Had he been twenty-one the Court could have sent him to Sing Sing, and if that was so he would be disqualified, and the fact that he lacked by days, months or weeks being under twenty-one does not change the rule of law.

The Court: I have said it has never been done that I know of. I have also said the sentence to Elmira being equivalent to a suspension of sentence—that being the question I am concerned with—I shall consider it the equivalent of a suspension of sentence and overrule the objection.

Mr. Steinbrink: We except.

Case proceeds.

BRODER sworn, warned and testified voluntarily in part as follows:

Direct examination.

By Mr. Beer:

Q. You are jointly indicted with Theodore S. Rosen, this man sitting over here, and this Wagner, on the charge of conspiracy?

A. Yes.

Q. And you pleaded guilty?

A. I did.

Q. You had a conversation with me and with the various officers of the Government about how this thing transpired?

A. I did.

Q. How the conspiracy happened?

A. Yes.

Q. You were convicted and sent to Elmira when?

A. January 27, 1914.

13 Q. What were you sent there for?

A. Forgery.

Q. Tell us the circumstances of that forgery?

Mr. Steinbrink: I object, incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Was it for stealing checks from the mail?

Mr. Steinbrink: I object, incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. How long are you out of Elmira?
A. Since April 20, 1915.
Q. How old were you when you left Elmira?
A. Nineteen years, nineteen and a half.

Other testimony heard.

Motion made at the close of the Government's case on January 28th, 1916.

Mr. Steinbrink: We renew the motions made at the opening, on the grounds made at that time, and now on the ground that under the indictment a crime has not been made out.

The Court: I think there is some evidence for a question of fact, and deny the motions separately.

Mr. Steinbrink: To which we respectfully except.

Mr. Bick: I join in the motion on behalf of Wagner, and particularly on the ground that without Broder's testimony no crime has been shown.

The Court: Denied.

Mr. Bick: Exception.

Motion made at the close of testimony on January 29, 1916.

14 Mr. Steinbrink: We renew the motions made at the close of the Government's case.

The Court: I shall deny them and leave the question with the jury, and give you an exception.

Jury charged by Court.

Jury retires.

Jury returns.

Verdict "guilty."

Mr. Bick: On behalf of both defendants, I move to set aside the verdict on the ground that it is against the weight of evidence, and on all the grounds assigned at the opening of the case by counsel for the defendants, and on the ground that the testimony of Broder was incompetent and that a new trial should be granted and his testimony excluded.

The Court: I will deny the motion.

Mr. Bick: Exception.

February 8, 1916.—Sentence imposed upon both defendants.

No other exceptions to the rulings of the Court upon admission of testimony and no other testimony has any bearing upon the questions raised by the exceptions presented herein.

The testimony of Broder was material and comprised the major part of the testimony offered by the Government.

No exception was taken by either side to the charge by the Court and the charge involved in no way the question herein raised.

15 The foregoing bill of exceptions hereby approved.

MELVILLE J. FRANCE,
United States Attorney.
MEIER STEINBRINK,
Attorney for Defendant Rosen.
BICK & FREEDMAN,
Attorneys for Defendant Wagner.

Settled and allowed as bill of exceptions.
March 8, 1916.

THOMAS I. CHATFIELD,
U. S. D. J.

16 EXHIBIT A.

At a Court of General Session of the Peace of the City and County of New York, holden in and for the County of New York, at the Building for Criminal Courts in the Borough of Manhattan of the said City, on Wednesday, the 28th day of January, in the year of our Lord one thousand nine hundred and fourteen.

Present: The Honorable Charles C. Nott, Jr., Judge of the Court of General Sessions, Justice.

THE PEOPLE OF THE STATE OF NEW YORK

against

SAMUEL BRODER.

On Conviction by Confession of Forgery in the Second Degree.

The Court being satisfied that the said Samuel Broder is 18 years of age, and has not been previously convicted and sentenced for a felony;

Whereupon it is ordered and adjudged by the Court that the said Samuel Border, for the felony aforesaid, whereof he is convicted, be imprisoned in the New York State Reformatory, at Elmira, there to be dealt with according to law.

A true extract from the minutes.

[SEAL.] EDWARD R. CARROLL,
Clerk of Court.

(10 cts. Stamp cancelled.)

17 *Petition for Allowance of Appeal.*

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA

vs.

THEODORE S. ROSEN and ABRAHAM WAGNER, Defendants.

To the Honorable Judges of the Circuit Court of the United States for the Second Circuit, in and for the Eastern District of New York:

The petition of Theodore S. Rosen and Abraham Wagner, respectfully shows:

First. That by virtue of a verdict of guilty rendered on the 29th day of January, 1916, after a trial before the Honorable Thomas I. Chatfield and a jury, the said Theodore S. Rosen was sentenced by the Honorable Thomas I. Chatfield on the 8th day of February, 1916, to be imprisoned for a term of eighteen months in the Federal Prison at the Atlanta Penitentiary; and the said Abraham Wagner was sentenced by the Honorable Thomas I. Chatfield on the 8th day of February, 1916, to be imprisoned for a term of one year in the Federal Prison at the Atlanta Penitentiary.

Second. That said conviction was had upon the trial of an indictment charging them with the violation of Sections 37 and 194 of the Criminal Code of the United States.

Third. That after said conviction and sentence, defendants obtained a stay of the execution of said sentence so that they might be kept within the County of Kings, State of New York, until
18 March 1st, 1916, though the sentence was to begin to run from the 8th day of February, 1916; and they as well obtained time in which to prepare the case and exceptions and assignment of errors for the purpose of appealing to the United States Circuit Court of Appeals for the Second Circuit, on the ground that said conviction was contrary to law and against the weight of evidence, and upon the exceptions,—these assignments of errors, however, being confined to the question of the competency of one Samuel Broder who had previously been convicted of a felony, and whose incompetency as a witness was urged upon the trial, and upon whose testimony the entire case of the Government depended.

Wherefore, your petitioners feeling themselves aggrieved by said conviction and sentence, appeal to the Circuit Court of Appeals of the United States in and for the Second Circuit, and pray that this appeal may be allowed, and that a transcript of so much of the trial as is necessary to present the exceptions presented, together with the orders and proceedings thereunder, may be transmitted to the Circuit Court of Appeals for review therein.

Dated, Brooklyn, N. Y., February 15th, 1916.

MEIER STEINBRINK,
Attorney for Theodore S. Rosen, Plaintiff-in-Error.
BICK & FREEDMAN,
Attorney for Abraham Wagner, Plaintiff-in-Error,
215 *Montague Street, Brooklyn, N. Y.*

Petition of appeal allowed.

THOMAS I. CHATFIELD,
District Judge of the United States for the Eastern District of New York, in the Second Circuit.

19 *Assignment of Errors.*

United States District Court, Eastern District of New York.

UNITED STATES OF AMERICA

vs.

THEODORE S. ROSEN and ABRAHAM WAGNER, Defendants.

And now come the plaintiffs in error, Theodore S. Rosen, by Meier Steinbrink, his attorney, and Abraham Wagner, by Bick & Freedman, his attorneys, and make and file the following assignment of errors:

First. One Samuel Broder was called as a witness for the Government, and objection was taken to his competency as such witness on the ground that it appeared from Exhibit A, which was then marked in evidence, that the said Samuel Broder had previously been convicted and sentenced for a felony, to-wit: forgery in the second degree. The objection was thereupon overruled by the Court, and exception duly noted.

Second. From the testimony of Samuel Broder, it subsequently appeared by his own admission that he had been previously convicted and sentenced for a felony, to-wit: forgery in the second degree; but the objection to his competency was overruled, and exception duly noted.

Third. At the close of the prosecution's case, a motion was
20 made to dismiss the indictment and direct a verdict of acquittal, upon the ground set forth in the motion, as appears from the record, and in that with the testimony of Samuel Broder eliminated, no crime had been proven against either Theodore S. Rosen or Abraham Wagner, and that the denial of the defendant's motion was error.

Fourth. At the close of the entire case, a motion was made to dismiss the indictment and direct a verdict of acquittal, upon the ground set forth in the motion, as appears from the record, and in that with the testimony of Samuel Broder eliminated, no crime had been proven against either Theodore S. Rosen or Abraham Wagner, and that the denial of the defendants' motion, was error.

Fifth. Upon the rendition of the verdict by the jury, a motion was made to set aside the verdict upon the ground, among others, that the testimony of the said Samuel Broder was incompetent and improperly received, because of his previous conviction for a felony, and that with the testimony of Samuel Broder eliminated, no crime had been proven against either Theodore S. Rosen or Abraham Wagner, and that the denial of the motion was error.

MEIER STEINBRINK,
Attorney for Theodore S. Rosen,
Plaintiff in Error.

BICK & FREEDMAN,
Attorneys for Abraham Wagner,
Plaintiff in Error.
215 *Montague Street, New York, N. Y.*

21 *Order Allowing Writ.*

At a Stated Term of the United — District Court for the Eastern District of New York, held at the Post Office Building, in the Borough of Brooklyn, City of New York, on the 15th day of February, 1916.

Present: Hon. Thomas I. Chatfield, United States District Judge.

ABRAHAM WAGNER and THEODORE S. ROSEN, Plaintiffs in Error,

against

UNITED STATES, Defendant in Error.

Upon motion of Bick & Freedman and Meier Steinbrink, attorneys for the plaintiffs-in-error, and upon filing a petition for a writ of error, it is

Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment heretofore entered herein, and that it is further

Ordered, that such writ shall operate as a supersedeas and suspend and operate as a stay of proceedings in this court, and that the plaintiffs-in-error be admitted to bail upon giving a joint bond in the sum of $5,000 with sufficient sureties, pending their appeal and conditioned that the said plaintiffs-in-error shall abide the judg-

22 ment of the Circuit Court of Appeals therein and surrender themselves into this Court when required by this Court or at the determination of said appeal.

THOMAS I. CHATFIELD,
U. S. D. J.

Citation.

By the Honorable Thomas I. Chatfield, one of the District Judges sitting in the District Court of the United States for the Eastern District of New York, in the Second Circuit, to The United States of America:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit to be holden at the Borough of Manhattan, in the City of New York, on the 15th day of March, 1916, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern District of New York, wherein Abraham Wagner and Theodore S. Rosen are plaintiffs-in-error and the United States is defendant-in-error, to show cause, if any there be, why the error in said judgment mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Brooklyn, in the City of New York, in the District and Circuit above named, this 15th day of

February, in the year of our Lord one thousand nine hundred and sixteen.

THOMAS I. CHATFIELD,
U. S. D. J.

23 *Stipulation.*

United States District Court, Eastern District of New York.

THEODORE S. ROSEN and ABRAHAM M. WAGNER, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendants in Error.

It is hereby stipulated and agreed that the foregoing printed pages is a true transcript of the record in the above entitled action agreed upon between the parties hereto, and certification thereof by the Clerk of the District Court of the Eastern District of New York, may be made.

Dated, Brooklyn, New York, March 21, 1916.

MELVILLE J. FRANCE,
United States Attorney,
Eastern District of New York.
MEIER STEINBRINK,
Attorney for Plaintiff in Error
Theodore S. Rosen.
BICK & FREEDMAN,
Attorneys for Plaintiff in Error
Abraham M. Wagner.

24 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. B. Gilkes, Clerk of the District Court of the United States, for the Eastern District of New York, do hereby certify that the annexed is a true transcript of the indictment, bill of exceptions, orders and all appeal papers made up to be transmitted to the United States Circuit Court of Appeals, for the Second Circuit, on writ of error of the defendants in the matter of the indictment of the United States of America, against Theodore S. Rosen and Abraham Wagner.

In witness whereof, I have hereunto set my hand and the seal of this Court, this 22nd day of March, 1916.

PERCY G. B. GILKES, *Clerk,*
By J. G. COCHRAN,
Deputy Clerk.

25 United States Circuit Court of Appeals, for the Second Circuit.

THEODORE S. ROSEN AND ABRAHAM WAGNER, Plaintiffs-in-Error (Defendants below).

against

UNITED STATES OF AMERICA, Defendants-in-Error (Plaintiff below).

Before Coxe, Ward and Hough, Circuit Judges.

Meier Steinbrink, Esq., Attorney for Rosen.
Messrs. Bick & Freedman, Attorneys for Wagner.
Melville J. France, Esq., U. S. Attorney, for the United States.

COXE, *J.*:

On the trial of Rosen and Wagner, indicted for tampering with the United States mail, a witness named Broder was called by the Government. He was jointly indicted with Rosen and Wagner and pleaded guilty. The record of his conviction in the General Sessions of New York of the crime of forgery in the second degree was offered in evidence. Objection was taken by defendants to Broder's competency as a witness but it was overruled. Was Broder a competent witness? He was at the time of his trial about eighteen years of age and was sent to the Elmira Reformatory. No
26 time limit was fixed by his sentence. The trial judge in the case at bar considered it the equivalent of a suspended sentence. We are unable to find an authority exactly in point but we think the decision in the court below was in accordance with the trend of modern opinion. Broder was not of age at the time and was convicted of the crime of forgery. Sending him to Elmira was for the purpose of reforming him if possible and should not have the stigma of a prison sentence for a term of years. The theory upon which Elmira was founded and is operated was to reform and save young men who have, perhaps, thoughtlessly entered upon a career of wrong doing. It is a school, and reformatory; it is not a prison. It would be a misfortune if it were held that proof of a sentence to Elmira alone disqualifies a witness and stigmatizes him for all time as a person unworthy of credence.

The raison d'être of the reformatory is to bring about the direct opposite of this: it is to reform and not to punish: to uplift, encourage and help the young men sent there.

We know of no case where a commitment to Elmira has been held to disqualify a witness and see no reason why an exception should be made of the present case.

The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare, arbitrarily, who were and who were not entitled to credence as witnesses and who
27 should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive

jurisdictions the tendency is to receive all the testimony bearing upon the issue, irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness but it does not absolutely exclude him from the witness stand.

The judgment is affirmed.

28 (Endorsed:) United States Circuit Court of Appeals, for the Second Circuit. Theodore S. Rosen et al., against The United States. Opinion. Coxe, J. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 14, 1916. William Parkin, Clerk.

29 United States Circuit Court of Appeals, for the Second Circuit.

THEODORE S. ROSEN AND ABRAHAM WAGNER, Plaintiffs-in-Error (Defendants below),

against

UNITED STATES OF AMERICA, Defendants-in-Error (Plaintiff below).

Before Coxe, Ward and Hough, Circuit Judges.

WARD, *Circuit Judge* (dissenting):

The question in this case is purely one of evidence, viz., did the judgment of conviction of Broder in the courts of the State of New York of the crime of forgery on his own confession make him incompetent as a witness in a criminal action in the District Court of the United States sitting in the State of New York? It has been frequently decided by the Supreme Court that the laws of the State in which the action is tried as to evidence do not apply to criminal cases in the courts of the United States. There being no Federal statute regulating the subject, it must be determined in the Federal courts by the common law existing in the State of New York at the time of the enactment of the Judiciary Act in 1789, United States v. Reid, 12 How. 361. See also Moore v. United
30 States, 91 U. S. 271; Schreiber v. Sharpless, 110 U. S. 76; United Copper Securities Co. v. Amalgamated, 232 Fed. Rep. 574. By that common law witnesses who were infamous were incompetent and those who had been convicted of treason, felony or crimen falsi were infamous, Greenleaf on Evidence, Sec. 373.

In Logan v. United States, 144 U. S. 263, 298-303, it was held that the competency of witnesses in a criminal case tried in the Circuit Court of the United States for the Northern District of Texas was governed not by the law of Texas but by the common law. A witness who had been convicted of felonious homicide in the courts of North Carolina was held competent, apparently on the ground that any disqualification created by the laws of North Carolina could have no effect beyond the limits of that state. A witness who had been convicted of larceny in the courts of Texas was also held

competent because he had received a full and unconditional pardon from the Governor. If the question of competency was to be decided by the common law, as the court held, it would seem as if both witnesses should have been held incompetent because the judgment of conviction in each case showed that the witness had been convicted of an offense which was a felony at common law rendering him infamous. However this may be, it cannot be assumed that the court intended to depart from its prior decisions.

There is no question in this case of enforcing the judgment of the State Court. It has been completely enforced. The question is as to its effect when offered in evidence. That a judgment
31 of conviction in a State Court should have one quality as evidence in the State Courts and quite a different one in the Federal courts is not illogical. When the sovereigns differ one must yield and the Supreme Court has persistently held that Congress did not intend the states to control in respect to evidence in criminal cases. Broder, the witness in this case, had been convicted in a court of the State of New York of what was at common law crimen falsi, viz., forgery. As the judgment had not been reversed and he had not been pardoned, his testimony should have been excluded. Such is the rule in the Federal courts, though not in the courts of New York. If it is antiquated and the judgment of conviction should go only to the credibility of a witness, Congress and not the courts should make the change. This was the view taken in a similar case by the Circuit Court of appeals for the Eighth Circuit in Maxey v. United States, 207 Fed. Rep. 327.

32 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Theodore S. Rosen et al., against The United States. Dissenting Opinion. Ward, Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 14, 1916. William Parkin, Clerk.

33 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 24th day of November, one thousand nine hundred and sixteen.

Present:

Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Charles M. Hough, Circuit Judges.

THEODORE S. ROSEN and ABRAHAM WAGNER, Plaintiffs in Error,

v.

UNITED STATES, Defendant in Error.

Error to the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. C. C.

34 Endorsed: United States Circuit Court of Appeals, Second Circuit. Theo. S. Rosen & ano. v. U. S. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 24, 1916. William Parkin, Clerk.

35 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 34, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Theodore S. Rosen and Abraham Wagner against United States, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of November in the year of our Lord One Thousand Nine Hundred and sixteen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Theodore S. Rosen and Abraham Wagner were plaintiffs in error, and The United States of America was defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and re-

37 moved into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of March, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,698. Supreme Court of the United States. No. 868. October Term, 1916. Theodore S. Rosen and Abraham Wagner, vs. The United States. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 27, 1917. William Parkin, Clerk.

38 & 39 United States Circuit Court of Appeals for the Second District.

THEODORE S. ROSEN and ABRAHAM WAGNER, Plaintiffs-in-Error,
against
UNITED STATES OF AMERICA, Defendants-in-Error.

It is hereby stipulated and agreed that the certified transcript of record now on file in the office of the Clerk of the United States Supreme Court be taken as a return to the writ of certiorari granted herein by the Supreme Court of the United States on the 22nd day of March, 1917, and that this stipulation be filed with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, and a certified copy of this stipulation be sent by him as his return to the writ aforesaid.

Dated, March 26th, 1917.

MEIER STEINBRINK,
Attorney for Plaintiffs-in-Error.
JOHN W. DAVIS,
Solicitor General.

40 [Endorsed:] United States Circuit Court of Appeals for the Second District. Theodore S. Rosen and Abraham Wagner, Plaintiffs-in-Error, against United States of America, Defendants-in-Error. Stipulation. Meier Steinbrink, Attorney for Rosen, Plaintiff-in-Error, 215 Montague Street, Brooklyn, N. Y.

41 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of said Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York March 29th, 1917.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

42 [Endorsed:] 868/25698. United States Circuit Court of Appeals, Second Circuit. Theodore S. Rosen & Abraham Wagner v. United States. Return to Certiorari.

43 [Endorsed:] File No. 25,698. Supreme Court U. S., October Term, 1916. Term No. 868. Theodore S. Rosen et al., Petitioner, vs. The United States. Writ of Certiorari and return. Filed April 3, 1917.